No. 14,668

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

JAMES HARVEY SHORT, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,
Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF OF MARGARET D. SHORT, ADMINISTRATRIX OF THE ESTATE OF ETHEL GRACE SHORT, DECEASED.

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PRELIMINARY STATEMENT.

The suit involves claims upon a policy of life insurance, dated January 1, 1943, which was issued upon the life of Irving Ritchie Short, a World War

II veteran, under the National Service Life Insurance Act of 1940. (54 Stat. 1009.) The said 1940 Act was amended and supplemented by the Insurance Act of 1946. (60 Stat. 781.) (In each case the title of the Act appears at the end thereof.) The 1946 Act contains provisions which deal with veterans' insurance which matured on or after August 1, 1946, the effective date of said act.

The case was heard upon a Stipulation of Facts and the admissions of the pleadings. (R. p 51.)

The veteran died on August 30, 1950. (Stipulation, Item 1, R. p. 52.) When the insured under such a policy dies, the insurance is deemed matured. (180 Fed. 2d, 217.)

The two acts mentioned have been codified in a series of sections, beginning with Section 801, Title 38, U.S.C. The main section of the 1940 Act is Section 602, which contains various lettered subsections. These subsections were amended and added to by Sections of the 1946 Act. It will aid the discussion to refer to the original acts and not to the code sections.

The policy is in the sum of $10,000. (R. p 5.) It named the veteran's mother, Ethel Grace Short, as principal beneficiary (R. p. 6) and, by an amendment, it named his brother, James Harvey Short, and Berkshire Industrial Farm of Canaan New York as equal contingent beneficiaries. (Stipulation, Item 3, R. p. 53.)

Mrs. Short, the principal beneficiary, filed a claim upon this policy. As the veteran did not direct that the

policy should be payable in a lump sum and did not select any of three additional methods of payment mentioned in Subsection (t) of the Act of 1946, added by Section 9 to Section 602 of the 1940 Act, the policy became payable in 36 equal monthly installments, pursuant to a designation which the statute did permit Mrs. Short, as primary beneficiary, to make. (Item 15, Stipulation, R. p 62.) The total of the installment payments aggregated slightly over $10,000, because the government allows something for interest on deferred payments.

Mrs. Short died on June 14, 1951, while action on her claim was pending. (R. p. 70, Item 25.) The Veterans Administration had not as yet passed on the claim. Its position was that it must first obtain proof from the War Department as to whether the veteran was in the Army at the time of his death and that if he was not, it must have proof of the veteran's death from the "proper service department", which it held was the State Department. It claimed that it took it until June 18, 1951 to get the required report from the War Department and that it thereupon requested a report of the death from the State Department. (See Items 24 and 26, Stipulation, Record, pages 69 and 70.) This was four days after Mrs. Short died. It claimed that it thereupon obtained the report of death from the State Department on July 3, 1951. (For these matters, see Item 24 of Stipulation, R. pages 69 and 70.) Its requirement as to procedure was simply unauthorized. Its delay was wholly unnecessary, and it was fatal to Mrs. Short's claim if the appellant's

position is right, for that position would make actual collection of her claim essential to her right thereto and her estate could have no interest therein, regardless of the cause of the delay. The Veterans Administration determined said fact of death shortly after Mrs. Short died, but on being advised of Mrs. Short's death, it ruled that nothing was payable on the policy to Mrs. Short's estate; that the whole of it, including the payments already accrued, was payable to the two contingent beneficiaries. (Item 27, Stipulation, R. p 70.) But note the time that was utterly wasted in getting the unneeded report from the War Department.

Said administrative hearing by the Veterans Administration may be attacked. It is attacked here. But for the waste of time in finding the death of the veteran, the ten installments of the insurance awarded to plaintiff by the judgment appealed from would have been paid before Mrs. Short died and the technical argument here made would have no foundation. We shall show as our first point that at least since the passage of the 1946 Act, the fairness and legality of the said hearing may be attacked.

And this brings up the further argument under our first point. In view of the change in the policy of the law as represented by the 1946 Act, is a claimant, such as was Mrs. Short, to be deprived of all right by death if it is perfectly clear that he proceeded in good faith and with ordinary diligence in trying to have his claim passed on? Had this case been dragged out nearly three years and Mrs. Short had died before

payment, about the whole policy would have passed to contingent beneficiaries, if appellant is right. We submit the policy of the law as laid down in the *Henning* case was definitely changed by the 1946 Act.

Margaret D. Short, as Administratrix of the estate of Ethel Grace Short, filed this suit after the final rejection of the claim. Said rejection was on the ground that, as the claimant had died, she could not collect the claim and that such collection was necessary to perfect the claim. (R. pages 70 and 71.) The complaint named as defendants the United States and the two contingent beneficiaries above referred to and also James Harvey Short individually and as Administrator of the estate of Irving Ritchie Short. All defendants answered.

The District Court's judgment (R. p 102) awards to plaintiff the installments that accrued on the policy prior to Mrs. Short's death and divides the balance equally between the contingent beneficiaries. It overruled the government's contention that the whole of the installments must be paid to the contingent beneficiaries. Its opinion was made a part of the findings and conclusions of law. (R. p. 82.)

Berkshire Industrial Farm has not appealed, but the government is virtually appealing on its behalf. James Harvey Short appealed individually and as Administrator of the insured's estate. He did not designate a record on appeal. He gave a cost bond. The present record presents the entire case. He asks that the judgment be affirmed and, if not affirmed, that the entire insurance shall be awarded to the veteran's

estate. In view of the provisions of the law which have abolished restrictions on designating beneficiaries of a policy that has matured, something may be said on the point that where a case evidences no collusion and has been ably and carefully considered, the government should consider itself as a stakeholder. Of course we have noted the cases of *U. S. v. Snyder,* 177 F. 2d, 442, and *U. S. v. Hoth,* 207 F. 2d, 386, which may indicate the contrary.

Important Changes in the 1940 Act.

Prior to the 1946 Act, all insurance subject to the 1940 Act was payable in installments only. See subsection (h) of Section 602 of the 1940 Act. Said subsection (h) was amended by Section 5(a) of the 1946 Act, but not in the respect mentioned, insofar as insurance already matured was concerned. The insurance here involved matured on August 20, 1950, that being the date of the death of the veteran, and subsection (t), which was added to the 1940 Act by Section 9 of the 1946 Act, provided that all insurance subject to the 1940 Act *which matured on or after the passage of the 1946 Act,* which was August 1, 1946, could be made payable at the option of the insured in any one of four methods: In a lump sum, or in any of three additional methods, each of which required payment of the insurance in installments. Section 4 of the 1946 Act explicitly repealed all restrictions on designating beneficiaries in case the insurance matured after the enactment of the 1946 Act took effect. The existing restrictions were prescribed in Subsection (h) (3) of Section 602 of the 1940 Act.

All old policies yet to mature and all new policies came under the liberal provisions of the 1946 Act. All matured policies remained subject to the 1940 Act.

Section 5(b) of the 1946 Act and Subsection (u) of Section 602, added to the 1940 Act by Section 9 of the 1946 Act, will be considered in the argument which follows.

This reply brief makes two points.

I. The failure to approve the claim of Ethel Grace Short in her lifetime, so as to permit the same to be paid was the result of the unauthorized and arbitrary conduct of the Veterans Administration and consequently the claim should be recognized as valid if it is otherwise the law that, to be entitled to installments that accrued on the policy in her lifetime, she had to collect the same and her estate had no interest therein.

Where the claimant has proceeded in good faith to enforce his claim, the drastic rule of the *Henning* case does not apply to failure to collect the claim.

II. The able and careful opinion of the District Court correctly construes Subsection (u) of Section 602. It shows that that subsection furnishes no support whatever for this appeal. It properly refers to Section 5(b) of the 1946 Act and gives its principle correct application.

ARGUMENT OF POINT I.

When at an administrative hearing, such as the law here provided, evidence adequate to establish a claim is presented or if it is offered and the offer ignored or if such a hearing is needlessly postponed until mere delay destroys the claim, the claim should be treated as an established claim. In such a situation, it is required that the administrative body that passes on the claim shall—

> "* * * follow a procedure which satisfies elementary standards and reasonableness essential to the due conduct of the proceeding which Congress has authorized."

Chief Justice Stone in

Diamuke v. United States, 297 U.S. 167, 80 L. ed. 561, 56 S. Ct. 594.

Specifically, the Supreme Court ruled that the administrative tribunal which was authorized to pass on a claim for retirement pay could not ignore uncontradicted evidence as to what it was supposed to find, that it was required to proceed fairly. The District Court was upheld and the Circuit Court reversed.

Here, the Veterans Administration ignored proof of the veteran's death, ignored offers of further proofs and adopted a method of procedure that was not sanctioned by any law or regulation and that improperly postponed its determination until after Ethel Grace Short died, thereby defeating (if and only if appellant is right on the law) the claimant's demand by mere delay. The delayed hearing became

no hearing because right to the demand depended on its collection by the claimant in her lifetime, if the appellant is right.

The Veterans Administration ruled that it must first have proof from the War Department as to whether Irving Ritchie Short was in the service of the Army at the time of his death and that if this proof showed he was not in such service, the proof of death should be furnished by the State Department. The rulings were unauthorized and they caused the delay. The first proof was not obtained until about four days after the claimant died, which was on June 14, 1951. (Item 25, R. p. 70.) The veteran died on August 30, 1950. (Stipulation, Item 1, R. p. 52.)

Under the 1940 Act and the ruling thereon in the *Henning* case, mere delay—however unauthorized—in acting on a claim was permitted to defeat it. Collection by designated living beneficiaries was the essence of the law. The "ladder of priority" had to be maintained. We urge that this requirement was abolished by the 1946 Act, in so far as this claim is concerned.

What are the facts as to hearing?

It is admitted that Irving Ritchie Short died on August 30, 1950. (Item 1, Stipulation, R. p. 52.) He was a veteran of World War II. (Same item.) The circumstances of his death are shown in Item 8 of the stipulation. (R. pp. 54 to 59.) He had taken his discharge from the Army. At the outbreak of the Korean War, he was in Formosa. He went from there to Tokio to again enter active service. A med-

ical examination was required. This showed he was seriously ill. His symptoms indicated polio. His brother, the defendant, James Harvey Short, a soldier on his way to Korea, was in Tokio. It was realized that proper medical care required placing the veteran in the United States Army Hospital in Tokio. That was done. He died within a few days.

It should be observed at this point that certain of the forms in use by the Veterans Administration for filing claims based upon the death of a veteran specifically state that proof of death shall not be required if the death occurred in a government institution. It would seem that a veteran is entitled to arrange to draw upon his policy of insurance and to receive fixed payments in the event of his disability. He may die and substantial amounts may have accrued in his favor. Form No. 8-614 relates to an application for accrued benefits by a veteran's widow, child or children or a dependent parent. On this form there is printed the following: "Specific Instructions: Proof of Death. Death of a veteran in a government institution need not be proven by a claimant. Otherwise a certified copy of a public record of death should be furnished." Form number 8-551 is a similar form of claim, the payment of which depends upon the death of a veteran and similar procedure is permissible. The form of claim which they furnished to Mrs. Short to sign and which she did sign has at the bottom V. A. Form 8-355c. It has at the top "Claim for National Service Life Insurance." It has blanks for filling in, like a private company form, and about halfway down it has the following:

"Section II. Certificate of Identification.
Note: Execution of Section II is unnecessary if insured died in active service or in a hospital under the jurisdiction of the United States Government. To be executed by a disinterested person."

Then came Section II consisting of blanks with the following printed guides:

"Name and address of Identifying person.
Age of Identifying person.
Name of insured.
Length of acquaintance with insured.
Place of death of insured.
Date of insured's death.
I have seen the body and know it to be the body of the above-named deceased. The statements made herein are made with full knowledge of the penalties imposed by law for making a false statement of a material fact."

.....

Signature."

The Veterans Administration was immediately advised of the death of Irving Ritchie Short in the Army Hospital referred to. Indeed, the Veterans Administration was later furnished with a death certificate executed by the physician of the Tokio Hospital. (See Stipulation, R. p. 68.) The certificate was not sworn to but no objection to the failure to swear to this certificate was ever made. (R. p. 69, middle of page.) Had it been made, it could have been corrected at once. In ordinary insurance, these certificates are not sworn to.

Moreover, when they call on a government hospital for proof of death, no requirement of any law or regulation said that the information they received had to be sworn to. When they got from the War Department the proof that the veteran had been discharged from the Army, that proof did not have to be sworn to.

Mrs. Short, in sending in her claim, assumed Section II did not have to be filled out.

The death telegram sent by the adjutant's general's office is dated August 31, 1950. It recited the insured had been hospitalized. (See Stipulation, R. p. 56.) The telegram is in a form which would have been sent had the applicant passed the physical examination and been sworn in before death. The fact that he did not get into the Army is rather immaterial. He was trying to.

The telegram was forwarded to the Veterans Administration about October 18, 1950. (Item 10, R. p. 60.)

A question arose as to shipping the veteran's body home to Berkeley. The brother, James Harvey Short, was present, and it was determined that the body could not be shipped home by the Army because the veteran was not back in the service, but that this would have to be handled by the State Department.

On September 20, 1950, the State Department sent to the mother, Ethel Grace Short, a speed letter, addressed to her at 1386 Euclid Avenue, Berkeley, California. This letter is copied in the record at

pages 57 and 58 and it shows that it was definitely determined, by the time of the writing of the letter, to-wit, September 20, 1950, that the veteran was not in the service and that Mrs. Short would have to provide the State Department with $500.00 to cover the expense in connection with the shipping of the body home to Berkeley and that she must also furnish the name and address of an undertaker who would receive the remains at destination. (R. pp. 57 and 58.) So it was a perfectly simple matter to determine whether the veteran was in the Army and if, as the Veterans Administration contended, that made it necessary to request of the State Department the furnishing of evidence of death, there was no excuse for starting inquiry Number 2, months and months after arranging for the shipping of the body and not before Mrs. Short died. (R. pp. 69, 70.)

It is stipulated (R. 59) that Mrs. Short sent the money required and furnished the name of the undertaker who would receive the remains on arrival at the Presidio in San Francisco and that the body was shipped aboard the U. S. Ship The General Gaffey; that it arrived in Berkeley and was buried there. (R. p 59.)

Item 9 of the Stipulation (R. p 56) recites the filing of the claim on the policy at the Oakland Office of the Veterans Administration about September 15, 1950. The claim was left at the Oakland Office, *together with the original of the telegram hereinbefore referred to.* The claim and the telegram were sent to the head office in Washington. (R., Item 10, page 60.)

Item 12 of the Stipulation (R. p 60) shows that on November 1, 1950, the attorneys for Mrs. Short wrote the Veterans Administration, stating that the claim had been sent on to Washington. The letter further recited that the veteran had gone from Formosa to Tokio "to again enter the service". (R. p. 61.)

Said letter also stated that on his taking the required medical examination, it was found the veteran had polio *and was placed in the U. S. Army Hospital in Tokio, where he died within a few days. The letter stated that Mrs. Short was not well and it was requested that her claim should be given special attention.* (R. p 61.)

So here they were advised that the death occurred in the U. S. Army Hospital in Tokio, while the veteran was trying to get back in the service.

On November 17, 1950, the reply to this letter came and it called attention to the fact that Mrs. Short had failed to sign the claim which she had filed in Oakland. A blank form of claim was enclosed.

Item 14, page 62 of the Record, shows that Mrs. Short's attorneys sent the duly executed claim on to Washington on November 24, 1950. Section II was not filled in. The form used was that hereinbefore described.

Item 15, page 62 of the Record, shows that Mrs. Short designated that the claim should be paid in 36 equal monthly installments.

Item 17, page 62 of the Record, shows that on October 5, 1950 Mrs. Short wrote to the Adjutant General

of the United States Army, indicating that she understood her son had gone from Formosa to Tokio under orders from the War Department and she urged that this would virtually place him in the service before he died and she complained of the inflicting on her of the expense of shipping the body home. The same Item 17 shows that the Adjutant General's Office answered Mrs. Short's letter on December 6, 1950, stating that Irving Short had

> "not re-entered the army at the time of his death and that there was no authority for the Department of the Army to reimburse Mrs. Short for her expenses incident to his death."

The said letter further stated:

> "Your son's remains are being returned to the United States aboard the U. S. N. S. General Gaffey, which departed from Yokohama, Japan, on December 2, 1950, and is scheduled to arrive at the San Francisco Port of Embarkation, Fort Mason, California, on or about 12th December, 1950. His remains were shipped on space available basis which will relieve you of paying the cost of ocean transportation."

So before the year was up the Army knew and acted upon the fact the veteran was not in the Army. If the Army could promptly send such a letter to Mrs. Short, it is inconceivable that the Army could not have sent like information to the Veterans Administration in a very short time.

Mrs. Short wrote to the Veterans Administration about her claim and, on December 22, 1950, they replied (R. p. 63), stating:

> "This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

This statement last quoted was on a printed form. The communication concluded

> "You will be further advised at the earliest possible date."

Item 19, page 64 of the Record shows that Mrs. Short wrote saying that she had heard nothing further and that on February 21, 1951, her attorneys sent a similar letter and that about March 5, 1951 the attorneys received a printed form of letter from the Veterans Administration reading:

> "Action on this claim is pending receipt of an official report of death from the Service Department."

Item 20, pages 64 and 65 shows that on March 31, 1951, the attorneys for Mrs. Short wrote the Administration, saying

> "What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs."

Our offer to help was simply ignored and they had been advised that Mrs. Short was seriously ill.

Paragraph 13 of the complaint contains a fuller statement of our letter of March 31, 1951 than does the Stipulation and Paragraph 13 of the complaint was admitted by the appellant's answer. (R. p. 35, Par. 8 of the Answer.) We copy from the said Paragraph 13 (R. pp. 18 to 20):

"Your letter dated March 5, 1951, which was in response to our letter of February 18, 1951, certainly does not offer much comfort to this young man's mother, who is seriously ill and who, we feel, is entitled to know the cause of the delay. All that your letter of March 5, 1951, states is:

"'6. Action on this claim is pending receipt of an official report of death from the Service Department.'

"What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs?

"Will you please let us know what is meant by the expression quoted?"

Said letter also contained the following:

"Harvey Short, his brother, was in Tokio when Irving Short arrived. The medical examination showed Irving had polio. He died very soon after this examination and while in the government hospital. Harvey wired his mother that the remains would be sent on by the Army. After considerable delay, a speed letter came from the State Department saying *that Irving was not back in the service at his death* and that Mrs. Short must send $500.00 to meet the expense of returning the body. We attended to the sending of this money, but we complained because it struck us that Irving was, for all practical purposes, serving his country when he died and we thought the argument made was very unjust. Weeks and weeks passed before the shipment occurred. After pleading for information, a letter dated December 6, 1950, finally came from the Adjutant General's Office to Mrs. Short. The

letter stated that space for shipment of the remains on the General Gaffey had been arranged.

The funeral occurred here. Are you concerned over proof of death? The son, Irving Short, is buried here.

Why cannot the mother be advised as to what is the real cause of this great additional delay, so that she can help in supplying any information that you may need?"

Note the last words of the foregoing letter.

The Court will note that the Circuit Court, in the case of *Diamuke v. United States,* cited at page 8, hereof, ruled that the law intended that the action of the administrative tribunal should be final and that this was overruled; that the law construed called for a reasonable hearing.

Item 21, page 65 shows that Mrs. Short herself complained and that the Veterans Administration replied on April 24, 1951 that

"It is necessary under Veterans' Administration regulation that there be of record proof of death of the above-named veteran."

Here this veteran had died. Had died in the government hospital and there was lying in the office of the Veterans Administration the death telegram hereinbefore mentioned. His brother was there in Tokio when he died. Arrangements were made to ship the body home. Why suggest that the roundabout method of proving the death of this veteran had to be pursued? The letter proceeds to state that the Veterans

Administration is endeavoring to obtain an official report of death from the Service Department. That meant the War Department. We quote:

> "This office is endeavoring to obtain an official report of death from the Service Department, however, it seems that the delay in furnishing the same is due to the fact there is a question as to whether or not the above-named veteran was in the military service at the time of his death. If the above-named veteran was not in the military service at the time of his death, it will be necessary that you obtain proof of death through the State Department, Washington, D. C.
>
> Upon receipt of information requested by this office from the Service Department relative to a report of death of the above-named veteran, further consideration will be given your claim and you will be advised."

It was not necessary that Mrs. Short should obtain proof of death through the State Department and it particularly was not necessary for the Veterans Administration to delay the case by an application to the State Department for proof of death made only after the War Department determined he was not in the service when he died.

There was no necessity for this and no regulation that did or could require it.

Mrs. Short's attorneys again wrote the Veterans Administration on May 15, 1951, wherein they distinctly offered to supply proof of burial of the veteran. Said letter (Item 22, R. p. 67) contained the following:

> "Everybody knows the boy is dead. The State Department, after great delay, finally shipped the body. He was buried here through Funeral Director Albert M. Brown & Co. We can supply you with proof of the burial."

But they took over. The last named letter further stated:

> "In fairness to Mrs. Short, it appears that action on this claim is bogged down by a purely technical question of procedure and, as we construe your letter, a decision must first be reached as to whether Irving Short was in the military service, and then apparently the question of some type of follow-up proof as to death must originate out of the War Department, but if it is determined that Irving R. Short was not in the military service, then the proof of death must be supplied by the State Department. Of course, so far as this death claim is concerned, the material fact is that Irving Short is dead." (R. p. 67.)

In view of the delay, Mrs. Short should have been told at once to go ahead and supply proof of death.

Why did they not write to the hospital? We are advised that, although they have changed their form of claim, they do send for a report from any government hospital in which the veteran may have died.

Mrs. Short was nearing the end of her life. We forwarded air mail stamped envelopes to the Veterans Administration. They simply would not use them. They sent them back.

Item 23, page 66 shows that with the letter of May 15, 1951 we forwarded a doctor's certificate in the

usual form, executed by the physician in the Tokio Hospital who had attended to the case. This certificate is set out at pages 68 and 69 of the record. It was in a form which has been used for years by Prudential Insurance Company of America. It shows the home address, the cause of death, the duration of the illness, and the date of death, and the date of the birth of the decedent and the place of death and the place or date of the first treatment and the date of the last treatment. We are told that this certificate was not verified, and that is correct, but it was not objected to and even on May 15 we could have wired the signer, Dr. Robert S. Chestnut, for a new certificate. Moreover, it is in the form which a government hospital must use to show the death of a veteran patient. And present objection to the certificate shows we should have been permitted to help out from the very first and that the red tape procedure was simply unauthorized.

Page 68 of the record shows that the Prudential Insurance Company was willing to act, and it did act upon the telegram in paying a policy of insurance. It returned to Mrs. Short both the telegram and the physician's certificate.

Item 24, page 69 of the records shows that on June 18, 1951, which was after the veteran died, the Veterans Administration received a report from the Army stating that Irving Ritchie Short was not in active service at the time of his death and, consistently with the manner in which Mrs. Short had been rebuffed, the Veterans Administration placed in its letter of June 18, 1951 the following:

> "As previously stated, an official report of death is required before this insurance may be settled. The Veterans Administration has this date requested an official report of death from the State Department. When this evidence is on file, prompt action will be taken on the claim."

Item 25, page 70: Mrs. Short died on June 14, 1951 and the attorneys at once mailed a letter to the Veterans Administration advising them of that fact.

Where is the law or the regulation that says that proof of death had to be an official report from the State Department?

Item 26, page 70 shows that on July 3, 1951, the State Department reported to the Veterans Administration that Irving Ritchie Short was dead.

So the information from the State Department was almost immediately available.

Item 27, page 76 shows the ruling that Mrs. Short's estate is entitled to nothing.

We do not believe there is a parallel for the treatment that was accorded to the claim of Mrs. Short.

How far is it from the State Department buildings in Washington to the Veterans Administration office?

How long does it take a person, who is employed in the Veterans Administration, to pick up the phone and inquire of someone in the State Department for the purpose of finding out whether, as recited in the letters brought to the attention of the Veterans Administration, the State Department had compelled Mrs. Short to pay the expense of shipping her son's

body home because he was not as yet in the service at the time of his death.

As already indicated (Item 18, page 63 of the Record), the Veterans Administration, on December 22, 1950, wrote Mrs. Short:

> "This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

That was before Christmas.

The balance of December, January, February and March passed and the form letters came indicating the same thing. (R. p. 64.)

On April 24, 1951 (R. pp. 65 and 66) came the letter that showed they were inquiring as to whether the insured had died while in the service. We refer to the letter of April 24, 1951. (R. p. 65.)

Then finally on June 18, 1951 (R. p. 69) they wrote Mrs. Short a letter, which she never received because of her death, that the report from the Army stated that the veteran was not in active service at the time of his death.

On July 3, 1951 the State Department sent the Veterans Administration an official report of the death of Irving Ritchie Short. (Item 26, R. p. 70.)

That was but two weeks after the Veterans Administration had written to Mrs. Short (R. p. 69) that it had received the report that her son was not in active service at the time of his death. (R. p. 69.) So all this delay was delay in obtaining information

which the State Department provided, almost immediately following the death of Ethel Grace Short.

What is there about the Army records that prevented a prompt report as to whether this young man was honorably discharged and was off the lists? It is just asking a Court to believe there are no records. He was paid when he was in the Army and they have payrolls. How long did it take the State Department to bill Mrs. Short for the $500.00? Were the same inquisitors dead? Were the same sources of information closed? How long did it take the adjutant general to write Mrs. Short she could not be repaid the expense, because Irving Short was not back in the Army? Why tie the matter up in red tape when it was Mrs. Short who was claiming?

Why rebuff Mrs. Short when she was obviously able to send any proof of death they were willing to suggest?

And finally under this head we urge that, as Section 4 of the 1946 Act destroyed the theory of the 1940 law that the payee of the insurance can be only persons of a restricted class, there is sound reason for holding that a contingent beneficiary may not take advantage of excusable delay in the collection of installments by the beneficiary who predeceased him. A rule should fail when the reason for it fails. How little the personal element enters into the payment is shown by the fact that following August 1, 1946 the veteran could designate as taker a trustee who does not die or a corporation wholly owned by the beneficiary. What was given to Berkshire Industrial

Farm could not be lost for failure to collect before death. But appellant contends a different rule could apply to James Harvey Short. Appellant contends that where the facts are otherwise exactly the same mere speed in collection determines the right to the installment. That is construction which does not in fact achieve real equality. (The end of Subsection (t) require certain types of beneficiaries in certain cases, but that is only because the kind of insurance mentioned in the third and fourth options requires beneficiaries capable of death.)

It is now provided that the Court can review an improper administrative order which is not made final by the statute.

Shaughnessy v. Pedreiso, ... U.S. ....., 99 L. ed. Advance Reports, 487.

ARGUMENT OF POINT II.

In an able and most careful opinion, the learned District Court has construed the law and we shall try to limit our discussion of our Point II.

Subsection (u), added to Section 602 of the 1940 Act by the 1946 Act, provides for sending certain installments of insurance that have accrued in the lifetime of the principal beneficiary to the estate of the insured. It assumes non-existence of a contingent beneficiary and tells where said installments and the balance of the policy shall go in a single sum.

Section 5(b) of the 1946 Act determines, through reference to Subsections (i) and (j), that if the insurance matured on or after August 1, 1946, installments of the insurance that have accrued when the principal beneficiary dies shall be a part of the deceased beneficiary's estate and not the property of an existing contingent beneficiary or the property of the estate of the insured. The 1946 Act let the existing law continue to apply to payments on insurance already matured.

Of course, Section 5(b) does not say, in terms, that a rule contrary to Subsections (i) and (j) should apply as between successive beneficiaries of installment insurance, but this right to accrued installments was old matter up for consideration under earlier statutory provisions. There were but two rules, so far as the dead beneficiary's estate was concerned. Either the dead beneficiary's estate got the accrued installments or it did not get them, and the Senate Committee Report to which we will refer sought to and did justify the passing of the accrued payments to the deceased beneficiary's estate. That is what they were talking about and if the *Henning* case had been decided, they would have referred to that.

When the Administrator of Veterans Affairs promulgated his regulations, he should have noted that subsections (i) and (j) provided that neither the beneficiary of installment insurance or the beneficiary's estate could have a right to accrued installments of that insurance, unless the beneficiary collected them before dying and that that rule was

made and changed from time to time in enacting and in amending veterans' insurance acts. There are several annotations on cases decided under these acts. We refer to a heading used in the annotations in certain volumes of A.L.R. and we refer to the volumes.

"VII Payment on Death of Beneficiary
(a) Accrued Installments."

55 A. L. R., page 592;
73 A. L. R., page 328;
97 A. L. R., page 1804;
147 A. L. R., page 1201.

It perhaps may be said there is no conflict here between different parts of the 1946 Act because Section 5(b) deals with the rights of contingent beneficiaries to installment payments, but if there is, then Section 5(b) states the general rule and it may stand while subsection (u) may apply in the particular situation therein defined. Section 5(b) pointed to a rule that would continue to be applied continuously to insurance being paid—the installment insurance of the 1940 Act that had already matured. There was considerable of this and it was governed by Subsections (i) and (j), referred to in Section 5(b). Under Subsection (h), Paragraphs (1) and (2) of the 1940 Act, as amended by the 1946 Act, this already matured installment insurance would be payable under an unexpired period of either 240 months or 120 months. As we have urged, all insurance of the 1940 Act was installment insurance. Section 5(b) shows awareness of the harsh and dangerous parts of the

old rule and said they should not apply to policies such as the one here involved. It was most pointed legislation and, because Subsection (u) does, under the one particular state of facts which it specifies, apply the harsh rule of the *Henning* case, is no reason for ignoring Section 5(b).

There is not a single sentence in the 1946 Act that gives accrued installments to a contingent beneficiary. As amended on May 23, 1949, Subsection (u) reads:

> "* * * and in any case in which no beneficiary is designated or the designated beneficiary does not survive the insured or a designated beneficiary not entitled to a lump sum settlement survives the insured and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance, whether accrued or not, shall be paid in one sum to the estate of the insured," etc.

The sentence requires for its operation that someone shall die who was designated as the recipient of the insurance installments that had accrued and were to accrue. It speaks of the "commuted value of the remaining unpaid insurance, whether accrued or not", and it says that all of it shall be paid in one sum to the estate of the insured.

It requires misapplying this law to say that it picks up the ten installments here involved and puts them in the hands of the contingent beneficiaries and that they then may proceed with the collection in their own behalf of the balance of the payments. If we try to say it is indeed logical to hold these contingent beneficiaries were substituted for the primary bene-

ficiary's estate, when the primary beneficiary died, that deduction obviously can not be based on Subsection (u) for the only sending of the accrued installments that it provides is a sending of them in one package or more tightly still in "one sum" to the estate of the insured.

Judge Murphy's Opinion makes it clear that Subsection (u), relied on so earnestly on the motion for new trial, is no help to appellant.

Section 5(b) of the 1946 Act must be given application to this case. It plainly relates to all insurance that has matured. It relates to rights to installment insurance provided for in the 1946 Act and not merely to lump sum insurance provided for in said Act. Such is the express wording of Section 5(b) and such is its meaning, as clearly shown by the Senate Finance Committee Report, which is hereinafter discussed.

But first let us say that the Opinion of the District Court does not assume at all that the policy of insurance here involved must be construed like a commercial insurance policy. That able Opinion recognizes that Congress provides the insurance and may change these policies. The 1946 Act depends on that rule, but it is entirely proper to say the 1946 law shows a tendency to have veterans' insurance conform more nearly to commercial insurance. The annotations in 3 A. L. R. 2d 851, on the case of *U. S. v. Zazove,* 334 U. S. 602, 92 L. ed. 1601, 68 S. Ct. 1284, show the inclination of the courts to give effect to the veterans' intention where that is possible in construing one of these policies. Twice in the majority opinion in the

Henning case, the Supreme Court said the ruling made sent the insurance other than as was intended.

The normal construction of a gift of insurance to a living person is that continuing to be alive to collect the insurance is not essential to the gift. As to ordinary insurance, see 37 Corpus Juris, p. 573.

The ruling in the *Henning* case shows that the basis for the contrary statutory rule is that Congress felt the wisdom of paying insurance to designated persons, that designating these persons was an aid to the war effort and that it would be inconsistent to permit the payments fixed upon to pass to heirs of the designated payees.

In *U. S. v. Henning,* 344 U. S. 66, 73 S. Ct. 114, 97 L. ed. 101, there are cited two cases under footnote numbered 15. They are: *McCullock v. Smith,* 293 U. S. 228, 79 L. ed. 297, 55 S. Ct. 167 and *United States v. Citizens Loan & Trust Co.,* 316 U. S. 209, 86 L. ed. 1387, 62 S. Ct. 1026. The language containing the footnote reference is:

> "And subsection (j), so as to disclaim any possible analogy to prior peace time legislation, which at one time had been construed to confer such right (15) emphasizes that 'no installments of such insurance shall be paid to the heirs or legal representatives as such of any beneficiary.' "

The *McCullock* case cites *Singleton v. Cheek,* 284 U. S. 493, 76 L. ed. 419, 52 S. Ct. 257, 81 A. L. R. 923, as being one which awarded certain accrued payments to a deceased beneficiary's estate. The statute there considered did not send the accrued payments to any other destination. The insured veteran's estate was

awarded certain payments, which payments had accrued on the policy before the veteran died, because the veteran had suffered permanent disability. The named beneficiary's estate got the payments that accrued after the veteran died and before the beneficiary died and the estate of the insured got the later installments. Here was the liberal rule. The dead veteran did not lose the right to certain of the accrued demands, because they were not paid in his lifetime. And a like rule was applied to the beneficiary. Subsection (u) sends the accrued and uncollected payments to the estate of the deceased veteran under particular circumstances. It is a special provision under which the veteran's estate is preferred over heirs of the deceased beneficiary. The subsection, as amended in 1949, is equally restricted. (See Chap. 135, 63 Stat. 74.)

Contingent beneficiaries simply are not mentioned. The comment on the 1949 amendment in Title 38 U. S. C. A., p. 788, is:

> "1949 Amendment Subsection (u), amended by Act of May 23, 1949, to make it clear that as to insurance maturing on or after August 1, 1949, which the beneficiary could not elect to receive in a lump sum settlement, any accrued installment or installments not paid to the beneficiary during his life time shall be paid to the estate of the insured rather than to the estate of the beneficiary." Title 38, U. S. C. A., p. 788.

A veteran might well prefer to let the accumulated payments go to the primary beneficiary's heirs and not pass the whole of or nearly all the payments on

to a contingent beneficiary. Litigation in the *Henning* case took seven years. Assume three years of litigation in this case. Assume it was groundless. Assume it tied up payments. Assume it was terminated in the first beneficiary's favor, but that he died five minutes before collection, no one but the contingent beneficiary would receive a dollar of the policy, if appellant is right.

It must be remembered that Subsections (i) and (j) of Section 602 of the 1940 Act which are referred to in Section 5(b) of the 1946 Act, dealt only with installment insurance. That was the only type of insurance named in Subsection (h) of the 1940 Act and it is not reasonable to say that language of such origin contained in Section 5(b) of the 1946 Act referred only to lump sum insurance—to one only of the kinds of insurance named in Subsection (t), added by the 1946 Act to Section 602 of the 1940 Act.

The Supreme Court has stated:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as Bacon's Abridgement, Section 2, it was said that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous or insignificant.'"
>
> *Ex Parte Pub. Nat. Bank,* 278 U. S. 101, 104, 73 L. ed. 202, 48 S. Ct. 43.

We ask the application of that rule in considering Section 5(b) of the 1946 Act.

At the beginning of the annotated code sections with which we are concerned, to-wit, Sections 801 and following of Title 38, there is a reference to "United States Code Service, Page 1394."

In the introduction to the book last mentioned, there is a statement as to the value, in construing federal Acts, of the reports of the congressional committees. Page 1394 of the volume identifies Senate Report 1705 (July 12, 1946) as being the Senate Finance Committee Report on the proposed 1946 Act. Turning to page 1397 of the volume, we have a statement as to the construction or purpose of Section 5 of the 1946 Act:

> "Section 5 of the committee amendment further provides that sub-sections 602(i), (j) and (k) of the National Life Insurance Act of 1940 be amended by adding at the end of each subsection the following:
>
> > 'The provisions of this sub-section shall not be applicable to insurance maturing on or after the date of the Insurance Act of 1946.'
>
> The provisions of the sub-section in question relate to the payment of insurance benefits which are limited to a restricted permitted class of beneficiaries and such provisions would not be in conformity with the disposition of insurance, payment of which is not limited to a restricted permitted class of beneficiaries."

The last reference was, of course, to what became Section 4 of the 1946 Act. Note that "Section 5" referred to in the quotation became Section 5(b).

Note that the report was dated July 12, 1946. It shows what finally went into the Act of August 1, 1946, 19 days later. On the first page of the report it is said:

> "The amendment proposed by the committee is a complete substitute for the bill as referred to the committee."

It is to be noted that in writing up the bill, what was added to subsections (i), (j) and (k) was all shown in one section—Section 5(b). When the two laws were codified and placed in Title 38, Section 801 and following, the prohibition was repeated under subsections (i), (j) and (k).

What we have here is a specific provision in subdivision (u), which governs a stated fact or set of facts not actually presented in this case, but we have also section 5(b), a general provision and a state of facts to which the principle of Section 5(b) can apply, to-wit: the claims of contingent beneficiaries. The following principle is to be noted:

> "Where the statute establishes a general rule and certain exceptions thereto, the court will not by *implication* add any more exceptions *and will not add exceptions merely because good reason exists therefor.*" (Italics ours.)
>
> 59 *Corpus Juris,* p. 974.

Note also the following:

> "Sec. 367. General and Specific Provisions.—It is an old and familiar principle, closely related to the rule that where an act contains special provisions they must be read as exceptions to a

general provision in a separate earlier or subsequent act, that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision."

50 *Am. Jur.,* Sec. 367, p. 371.

We refer again to a general rule, which is well established.

"According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses. Pease v. Whitney, 5 Mass. 380; Nichols v. Bertram, 3 Pick. 342; State v. Perrysburg, 14 Ohio St. 472; London etc. Railway v. Wandsworth Board of Works, L. R. 8 C. P., 185; Bishop on the Written Laws, sec. 112a. The deed of the mayor to Townsend having been executed in conformity with the special Act, was, therefore, valid and effectual to convey the legal title."

Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 S. Ct. 357.

Of course, the executive departments may enact regulations, but they

"* * * must be reasonable and consistent with the law, in order to be valid."

54 *Am. Jur.,* Sec. 41, p. 557.

Judge Murphy's opinion shows this.

We repeat Section 5(b):

"5(b). Subsections (i), (j) and (k) of Section 602 of the National Service Life Insurance Act of 1940, as amended, are amended by adding at the end of each of such subsections the following: 'The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946.'"

The language so qualified is language of the 1940 Act, which Act dealt with installment insurance only and which, after August 1, 1946, was to continue to apply to the existing matured installment insurance of the 1940 Act until it was all paid out.

It is hardly in order to even refer to said Subsections (i) and (j) without referring also to the havoc they produced in the *Henning* case. We quote them.

"(i) * * * The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h)."

"(j) No installments of such insurance shall be paid to the heirs or legal representatives as

such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made."

Act of 1940.

(Subsection (k) is referred to in Section 5(b) along with Subsections (i) and (j), but the reference is immaterial here.)

Can it be argued that the intention of Section 5(b) of the 1946 Act was to have words of such origin apply only to lump sum insurance of the 1946 Act? Section 5(b) plainly refers to any insurance maturing after the enactment of the 1946 Act and that insurance could certainly be payable in one sum or in installments. The language says (i), (j) and (k) "are amended". How? The wording is explicit. If we can imply a permissible selecting of contingent beneficiaries of installment insurance, we cannot hold that Section 5(b) has no application to the additional rights attempted to be implied here for the benefit of contingent beneficiaries. Their taking destroys the plan of taking specified in Subsection (u) of Section 602; destroys the sending of the uncollected accrued insurance to the only recipient named in the subsection.

We have contradiction here, but Courts reduce contradiction into the narrowest limits possible. They do not imply conditions in order to widen the scope of what is special and reduce the scope of what is general. The Courts avoid harsh results in construing a law if that is possible and it is harsh to hold that

the right to insurance awarded to a beneficiary depends on a footrace with death in getting to a paying teller's window. Death won the race in the *Henning* case. The Court referred to "three deaths" and "seven years" of litigation. The Senate Finance Committee Report threw out the whole group of selected beneficiaries of the 1940 law, if the insurance matured on or after August 1, 1946. The law had harsh results in cutting out the rights of estates of deceased beneficiaries—caused it by mere delay in determining rights. Congress knew this. And we urge that we have no right to say that it shall be implied that the estate of a primary beneficiary shall have no right here because we have before us the demand of two contingent beneficiaries.

The government's brief objects to "filtering down" of benefits to creditors or unknown heirs. That is the priority ladder argument of the *Henning* case and the *Baumet* case, a companion case. The *Henning* case dealt with a wartime measure. The 1946 law is not such a measure and there is no "ladder of priority" in the 1946 law and such was, in effect, the statement of the Senate Finance Committee herein referred to.

The *Henning* case states:

> "No peacetime amendments, as those which in 1919 and 1924 specifically altered the deliberate wartime result can aid the contention presented today."
>
> *U. S. v. Henning,* 344 U.S. 66, 97 L. ed. 101, 73 S. Ct. 114.

Of course, the particular rule applied in Subsection (u) is at partial variance with what was laid

down in Subsections (i), (j) and (k) of Section 602 of the 1940 Act, but that does not mean that Section 5(b) was purposeless, so far as installment insurance was concerned, that it did not negative the argument that if the veteran's policy matured on August 1, 1946, installments matured and uncollected at the death of the first beneficiary would go to a contingent beneficiary. The fact is that the 1940 Act permitted contingent beneficiaries. They could be named within a statutory preferred list and if not so named, the statute named the substitute. *The Henning case shows that by express provision of the 1940 Act, the secondary choice got all installments that were uncollected at the primary beneficiary's death.* So neither Henning's father or his estate nor the true mother of Henning or her estate got anything, because they died while litigation hung up payment.

We repeat and respectfully urge that Subsection (u) simply does not cover a case like this one and that Section 5(b) clearly fits the situation which arises when a beneficiary dies who has failed to collect installment insurance and a contingent beneficiary sets up the claim that the amounts are his. It is at this junction that Section 5(b) can and does apply.

Dated, Berkeley, California,
June 20, 1955.

Respectfully submitted,
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